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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	**GN Docket No. 93-252**
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF THE PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA

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SUMMARY

Within the meaning of Section 332(d) (1), the term "for profit" includes any for profit mobile service, including acting as manager of a shared system; the term "interconnected service" includes any service which is interconnected with the public switched network, including store-and-forward service; and the phrase "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public" includes any service which is held out to the public or to groups of users by means of a SMSA or similar wide area service or by frequency or channel reuse.

Within the meaning of Section 332(d)(3), the term "functional equivalent" is intended to exclude from private mobile service any wide area service or service that makes use of frequency or channel reuse which customers perceive to be functionally equivalent to commercial mobile service.

The following services should be treated as commercial mobile service: wide area SMR and common carrier mobile services such as cellular, paging services, SMR wide area wireless services, and wide area PCS.

The FCC may preempt state jurisdiction over the right of mobile services to interconnect with the landline network, but not over interconnection rates.

States should be permitted to petition to regulate rates and entry based on a showing (1) that 15% of basic service subscribers in any telephone exchange area do not have access to basic service from any telephone company other than a commercial mobile licensee,

(2) that the rates for basic services offered by the commercial mobile service providers are higher than the rates of the pre-existing landline carrier, or (3) that the commercial mobile service provider has market power in a relevant market.

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The Public Service Commission of the District of Columbia (D.C. PSC), pursuant to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking in the above-referenced proceeding[1/], hereby files its comments.

I. INTRODUCTION

Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993[2/] (Budget Act) amends 47 U.S.C. §§ 3(n) and 332 to change the regulatory framework for all mobile services. In essence, the Budget Act provides that (1) mobile services are to be divided into commercial and private; (2) only commercial mobile services are to be subject to common carrier regulation; (3) the FCC may exempt commercial mobile services from some common carrier regulation; (4) state regulation of rate and entry regulation would be preempted for commercial mobile service except where the FCC

1/ In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rulemaking, FCC 93-454, released October 8, 1993 (NPRM).

2/ Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

grants individual states' petitions to regulate rate and entry; and (5) any state regulation of private mobile services is to be pre-empted.

In this proceeding, the FCC seeks to establish regulations pursuant to the Budget Act. The D.C. PSC comments below on the various definitional questions, as well as the applicability of the commercial mobile category to particular services. It also comments on a variety of pre-emption questions raised by the FCC.

II. THE DEFINITION OF COMMERCIAL MOBILE SERVICE SHOULD BE BROAD ENOUGH TO MAKE CLEAR THAT IT APPLIES TO COMPANIES WHICH PROVIDE SERVICES WHICH ARE SIMILAR TO THOSE OF COMMON CARRIERS

Section 332(d) (1) provides that a mobile service will be classified as commercial if it is "provided for profit" and makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." NPRM at ¶10. "Interconnected service" is defined as "service that is interconnected with the public switched network" or service for which an interconnection request is pending. The FCC has asked the parties to comment on a number of questions:

- Should a service be deemed "for profit" if the service as a whole is offered on a commercial basis, even if the interconnected portion of the service is offered on a non-profit basis? Id. at ¶12.

- Should a licensee which operates a system for internal use but makes excess capacity available on a for-profit basis be deemed to be providing for-profit service to that extent? Id.

- Could a sharing arrangement be deemed to be "for profit" if a third party is hired to manage the service? Id. at ¶13.

- Must interconnection be offered at the end user's level? Id. at ¶16.

- Does a carrier which interconnects with a commercial mobile service provider necessarily offer "interconnected service" because its messages would be transmitted on the public switched network? Id. at ¶18.

- How are store-and-forward services to be treated? Id. at ¶21.

- Is the term "public switched network" different from the traditional term "public switched telephone network?" Id. at ¶22.

- Are services available to limited eligibility users available "to a substantial portion of the public?" Id. at ¶25.

- Should limitation on a system's capacity prevent it from being classified as a commercial mobile licensee? Id. at ¶26.

- Should limitation on the size of a service area prevent a system from being classified as a commercial mobile system? Id. at ¶27.

The purpose of the commercial mobile provisions of the Budget Act is to broaden applicability of common carrier treatment to private carriers which have become functionally indistinguishable from common carriers as the result of FCC decisions which, for example, permitted eligible users of private carriers to include individuals on an indiscriminate basis, as well as federal government entities. House Report No. 103-111, 103rd Cong., 1st Sess. (1993) (House Report) at 260, citing In the Matter of

Amendment of Part 90, Subparts M and S, 3 FCC Rcd 1838, 1840 (1988); In the Matter of Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, Notice of Proposed Rulemaking, PR Docket No. 93-38 (rel. March 12, 1993). In the D.C. PSC's view, therefore, the provisions should be construed broadly to prevent companies from evading common carrier regulation.

With respect to the definition of "for profit," any for profit mobile service should be covered, whether or not the particular service that is for profit is interconnected or whether part of the capacity is used for internal purposes. The FCC needs to be vigilant to prevent a company from allocating costs in a manner which permits it to show profit on only non-interconnected activities. A broad rule will prevent the use of such creative accounting. Further, for-profit uses of capacity will compete with common carriers whether or not part of a company's capacity is for internal use. Finally, while true sharing would not be "for profit" within the meaning of the statute, the Commission should adopt rules to prevent sharers from using third party managers in order to avoid the purpose of the Budget Act. Such an arrangement might occur when the real offeror of the service is the manager and the sharers are really the user of the manager's service. Therefore, because of the likelihood of such an arrangement, any third party manager should be regulated as a commercial mobile service provider.

With respect to "interconnected service", the relevant question is whether a customer of the licensee may send messages over the public switched network. Thus, where a local company interconnects with a commercial mobile service provider, the customer of the commercial mobile service provider receives interconnected service, since its call uses the network. Similarly, the D.C. PSC agrees with the FCC that interconnection through a private branch exchange, a switchboard operator, or a computer would constitute interconnection because it permits customers to use the network. See NPRM at ¶18, citing Establishment of Satellite Systems Providing International Communications, Report and Order, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985), recon., Memorandum Opinion and Order, 61 Rad. Reg. 2d (P&F) 649 (1986), further recon., 1 FCC Rcd 439. The same reason, however, would require that "store-and-forward" services that link to the telephone network via an operator or computer should also be deemed to be interconnected. See NPRM at ¶21. The mere fact that interconnection is not on a real time basis does not preclude customers from sending messages via the public switched network. Finally, the use of the public switched network for internal control purposes should not be treated as interconnection, in the D.C. PSC's view, since in that case there would be no interconnected service provided to the public. Id. at ¶20.

With respect to the meaning of the phrase "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public," the D.C. PSC urges that the

language should be interpreted to include any service which is held out to the public or to groups of users by means of a Standard Metropolitan Statistical Area (SMSA) or similar wide area service or by frequency or channel reuse. The fact that the public is comprised of groups of eligible users should not make a difference, so long as the service is available to a wide area or increases capacity by frequency or channel reuse. The language of the Conference Report cited by the FCC, that the definition covers "broad or narrow classes of users so as to be effectively available to a substantial portion of the public" only makes sense if the commercial mobile definition is not restricted by the nature of the eligible user group. See NPRM. at ¶25. Further, the Conference Report also states that a service is not the functional equivalent of commercial mobile service if it does not make service available through a SMSA or similar wide area and does not employ frequency or channel reuse or its equivalent. Id. at 32. Consequently, based on this legislative history, the D.C. PSC submits that if the service does not provide SMSA or similar wide area service and does not employ frequency or channel reuse, it is not available to a substantial portion of the public. Similarly, limitations on capacity or size of service area that makes availability of the service equivalent to less than SMSA service would preclude treatment as a commercial mobile system.

III. THE DEFINITION OF PRIVATE MOBILE SERVICE SHOULD BE NARROW ENOUGH TO EXCLUDE FUNCTIONAL EQUIVALENTS OF COMMERCIAL MOBILE SERVICE

Section 332(d) (3) defines private mobile service as any mobile service that is not a commercial mobile service or the "functional equivalent of a commercial mobile service". As the FCC states, the Conference Report language that the "functional equivalent" clause was added to make clear that the term "private mobile service" "includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service...." Id. at ¶28. As stated above, the Conference Report defined functional equivalency in terms of the area served. Id. at 32. In addition, the D.C. PSC supports the use of a definition of "functional equivalency" based on customer perception, which the FCC has used in defining "like services" within the meaning of section 202 of the Communications Act. Id. at ¶33, citing AT&T Communications Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039 (1991), affd, Competitive Telecommunications Assoc. v. FCC, Slip Op., No. 93-1013 (D.C. Cir. Aug. 6, 1993); Ad Hoc Telecommunications Users Comm. v. FCC, 680 F.2d 790 (D.C. Cir. 1982); American Broadcasting Cos. v. FCC, 663 F.2d 133 (D.C. Cir. 1980); Western Union International Inc. v. FCC, 568 F.2d 1012 (2d Cir. 1977), cert. denied, 436 U.S. 944 (1978); American Trucking Assoc. v. FCC, 377 F.2d 121 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967). This definition of functional equivalency has met the test of judicial review and is suited to prevent private carriers from providing to its customers

services which are essentially the same, from their viewpoint, as common carrier services.

IV. IN DETERMINING THE CLASSIFICATION OF EXISTING AND PROPOSED SERVICES, THE FCC SHOULD ADHERE TO DEFINITIONS AS PROPOSED BY THE DCPSC AND SHOULD NOT GIVE LICENSEES THE ABILITY TO CHOOSE THEIR CLASSIFICATIONS

The FCC has proposed which services should be determined to be private. In addition, it has proposed that personal communications service (PCS) licensees be permitted to choose what classifications will be applicable to them or to parts of their services.

The D.C. PSC agrees with the FCC that private non-commercial systems and satellite licensees may be treated as private because the former relates to service for the licensee's internal use and the latter is permitted by section 332(c) (5). See NPRM at ¶s 35, 43. The D.C. PSC also agrees that wide-area specialized mobile radio (SMR) licensees and common carrier mobile services such as cellular should be treated as commercial because they are providing interconnected service available to a substantial portion of the public, but that those licensees which do not provide wide area service or employ frequency re-use to increase their capacity should be treated as private. Id. at ¶s 36, 41. As the FCC states, the D.C. PSC's position that store-and-forward services are interconnected requires that private carrier and common carrier paging services be treated as commercial. ¶s 39, 41. The D.C. PSC's view that licensees which provide functionally equivalent service from the customer's viewpoint are not private mobile systems requires commercial mobile treatment of providers of SMR wide area wireless services, since they are functionally equivalent

to wide area wireline services. Id. at 38. With respect to SMR wide-area service providers who serve specialized user groups, the D.C. PSC submits that their classification should depend on whether their service is held out to a sufficient number of persons.

The D.C. PSC does not support the FCC's proposal to permit PCS licensees to choose whether they will provide commercial or private services, or to pick and choose which portions of their service will be treated as commercial and which portions as private. Id. at ¶s 44-48. The House Report stated that

> [t]he Committee finds that the disparities in the current regulatory scheme could impede the continued growth and development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private.

House Report at 260. The FCC's proposal would permit all PCS licensees to classify their service as private, contrary to Congress' wishes.

Of course, if PCS licensees which elect to classify themselves as private are limited to services for which they may not earn a profit, services which are limited to small areas, or services which do not appear in the perception of customers to be functionally equivalent to the services of common carries, then the D.C. PSC would have no objection. However, the FCC must have the ability to determine whether these claims are accurate. In that context, allowing part of a service to be commercial and part to be private appears unenforceable. For example, the ability of a licensee to shift costs between services would make it virtually impossible to determine whether a service was non-profit.

Consequently, the D.C. PSC proposes that all PCS service should be treated as commercial unless the PCS service does not involve SMSA wide service or frequency or channel reuse, and, to the extent that it provides specialized services, that it be limited in the number of customers it may serve.

V. THE FCC SHOULD NOT PREEMPT STATES FROM REGULATING RATES FOR INTERCONNECTION

There is nothing in the Budget Act that would authorize the FCC to pre-empt states from regulating the rates that local exchange carriers receive for interconnecting intrastate facilities to mobile service providers. Thus, section 332(c)(1)(B) does not change the FCC's jurisdiction to order interconnection and section 332(c)(3) only relates to rates charged by mobile service providers. The FCC has proposed to pre-empt state regulation of interconnection itself, but not to pre-empt state regulation of interconnection rates at this time. The D.C. PSC supports this action. Thus, we recognize that the right of interconnection is unitary for state and federal purposes. However, the revenue from intrastate service, including revenue from interconnection of intrastate mobile calls, is subject to the jurisdiction of state commissions, pursuant to 47 U.S.C. §153(b). This revenue is necessary to offset intrastate costs and to reduce the rates that other intrastate users would pay. Consequently, no pre-emption of state regulation of interconnection rates should be ordered.

VI. THE PROCEDURES FOR STATE PETITIONS TO INITIATE RATE REGULATION SHOULD PROTECT BASIC SERVICE CUSTOMERS

Section 332(c)(3)(A) pre-empts state and local entry

regulation of all commercial mobile services, but permits states to petition the FCC to permit such regulation based on a showing that

> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.

In the D.C. PSC's view, this language cannot be read literally because the reference to "such market conditions" in clause (ii) literally refers to those market conditions which are the basis for granting the petition under clause (i), and yet the language specifies that a state need meet only one of the two clauses. The House Report asserts that

> Section 332(c)(3)(b) permits states to petition the Commission for authority to regulate rates for any commercial mobile services that have become a substitute for telephone service, or where market conditions are such that consumers are not protected from unreasonable or unjust rates.

House Report at 261. While the bill was subsequently amended by the Senate to require that the service be a substitute for a substantial portion of the telephone land line exchange service within a state, the Conference Report does not indicate any intent to limit a state petition based on the claim that the new service was a substitute for an existing service by a requirement that certain market conditions exist.

In view of this legislative history and the language of the statute, that D.C. PSC proposes that a state may file a petition at any time showing (1) that 15% of basic service subscribers in any telephone exchange area do not have access to basic service from any telephone company other than a commercial mobile service licensee, (2) that the rates for basic services offered by the commercial mobile service provider are higher than the rates of the pre-existing landline carrier, or (3) that the commercial mobile service provider has market power in a relevant market. The proceeding should provide for public notice and comments in thirty (30) days and a response in fifteen (15) days by the state. The first test is a numerical method to determine whether the commercial service is a replacement for a substantial portion of the telephone land line exchange service in the state, and is based on the statement in the Conference Report that states should be permitted to regulate "if subscribers have no other means of obtaining basic telephone service". H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) at 493. The second test is a numerical method of determining whether market conditions fail to protect consumers from unreasonable rates. Although it cannot be determined from this test whether the rates charged are unreasonable, it seems clear that, where it is met, competition has failed to limit the rates, and it can be presumed that such conditions will not preclude unreasonable rates. The third test is a more judgmental test of market power which can also be used to determine whether market conditions protect consumers from

unreasonable rates should either of the first two tests be met, the FCC should grant the petition. If neither is met, the FCC should exercise its judgment to evaluate a showing based on the third test.

No petition to remove regulation after a state petition is granted should be permitted for a period of three years. At that time, petitioners should be required to show that conditions have changed sufficiently to warrant deregulation. The procedural schedule should be similar, and the FCC should require state deregulation only if it finds that conditions have substantially changed.

CONCLUSION

The D.C. PSC respectfully requests that the FCC adopt the policies set forth herein.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
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